

**TESTIMONY OF
MICHAEL ACEITUNO
SACRAMENTO AREA OFFICE SUPERVISOR
OFFICE OF PROTECTED RESOURCES
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

**BEFORE THE
SUBCOMMITTEE ON WATER AND POWER
COMMITTEE ON RESOURCES**

**THE GOALS AND OBJECTIVES OF THE CALFED BAY-DELTA PROGRAM
JUNE 28, 2003**

Good afternoon, Mr. Chairman and members of the Committee. I am Mike Aceituno, Sacramento Area Office Supervisor for Protected Resources, National Marine Fisheries Service (NOAA Fisheries), Department of Commerce. I am here representing Bill Hogarth, Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration. I want to thank you for the opportunity to be here today to address the discretion and authorities granted to NOAA Fisheries to undertake activities related to the California Bay-Delta Program (CALFED).

NOAA Fisheries is committed to the concepts of CALFED and believes that they are consistent with our overall mission: "To conserve our Nation's living marine resources - including anadromous fish." Central to our mission is the maintenance of the health of the ecosystems upon which anadromous species rely within California. CALFED's approach recognizes that, in order to reverse the decline in ecosystem health which has been observed over the past several decades within the San Francisco Bay/Sacramento and San Joaquin Delta watershed, an integrated approach aimed at ecosystem restoration, improved water supply reliability and water quality, and improved levee system integrity is necessary. What we've learned is that management objectives associated with these programs are often interrelated and interdependent and that in the long-term a balanced, comprehensive approach is necessary. NOAA Fisheries recognizes the importance of such an approach and, as I mentioned, is committed to the concept. To this end we have been an active participant in the CALFED process since its beginning in May 1995, and anticipate continued involvement within the framework of the newly formed California Bay-Delta Authority.

I have been asked to address the Subcommittee today regarding NOAA Fisheries' existing authorities and discretion allowing us to perform activities within the CALFED Program under the following categories: water storage, water conveyance, water use efficiency, water transfers, ecosystem restoration, watersheds, water quality, levee stability, science, and water supply reliability. In addition, I have been asked to address the adequacy of these authorities and the need for new authorities to complete activities that NOAA Fisheries is responsible for within the CALFED program.

Existing Authorities related to CALFED

NOAA Fisheries' continued involvement and participation in the CALFED Program are authorized in several statutes: 1) the Endangered Species Act; 2) the Magnuson-Stevens Fishery Conservation and Management Act; 3) the Anadromous Fish Conservation Act; 4) the Federal Power Act; and, 5) the Fish and Wildlife Coordination Act.

The **Endangered Species Act** (16 U.S.C. 1531-1543; Pub L. 93-205, as amended) authorizes NOAA Fisheries, along with the U.S. Fish and Wildlife Service, to conduct certain activities to provide for the conservation of species which are in danger of extinction throughout all or a significant portion of their range or likely to become so in the foreseeable future. NOAA Fisheries has ESA responsibility for marine species and Pacific salmon and steelhead. Within the CALFED focus area these include the endangered Sacramento River winter-run Chinook salmon, the threatened Central Valley spring-run Chinook salmon, and the threatened Central Valley steelhead.

Section 4(f) of the ESA requires the development and implementation of a recovery plan for a listed species if it will promote the conservation of the species. Section 7 requires Federal agencies to engage in consultation with NOAA Fisheries for actions that may affect a listed species, to ensure that their actions are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat for the species. Both Section 7 and Section 10 provide NOAA Fisheries to allow incidental take of listed species in certain circumstances. NOAA Fisheries is actively working with the CALFED program in the development and implementation of its Multiple Species Conservation Strategy (MSCS) through early coordination and has recently established the Central Valley Technical Recovery Team to develop a Section 4(f) recovery plan for listed salmon and steelhead within the CALFED focus area.

The 1996 amendments to the **Magnuson-Stevens Fishery Conservation and Management Act (MSA)** (16 U.S.C. 1801 et seq) set forth new mandates for NOAA Fisheries and federal action agencies to protect important marine and anadromous fish habitat. Federal action agencies which fund, permit, or carry out activities that may adversely impact Essential Fish Habitat (EFH) are required to consult with NOAA Fisheries regarding potential adverse effects of their actions on EFH. Essential Fish Habitat is defined in the MSA as "...those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity...".

NOAA Fisheries regulations further define "waters" to include aquatic areas and their associated physical, chemical, and biological properties; "substrate" to include sediment, hard bottom, structures underlying the waters, and associated biological communities; "necessary" to mean the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and "spawning, breeding, feeding, or growth to maturity" to cover a species' full life cycle.

Within the CALFED focus area, the Pacific Fisheries Management Council has delineated EFH for west coast groundfish, coastal pelagic species, and Pacific coast salmon. Pacific salmon occur throughout the CALFED focus area while groundfish and pelagic species occur only within San Francisco Bay and the western extremes of the Sacramento-San Joaquin Delta.

The **Anadromous Fish Conservation Act** (16 U.S.C. 757a-757g; P.L. 89-304, as amended) authorizes the Secretary of Commerce, along with the Secretary of the Interior, to enter into cooperative agreements with States and other non-Federal interests, to protect anadromous fishery resources. Pursuant to the agreements authorized under this Act, the Secretary may, among other activities, conduct investigations, engineering and biological surveys, and research and study and make recommendations regarding the development and management of streams and other bodies of water consistent with the intent of the Act.

The **Federal Power Act (FPA)** (16 U.S.C. 791a-828c; Act of June 10, 1920, as amended) provides authority to NOAA Fisheries to recommend conditions to protect, mitigate damages to, and enhance anadromous fish, including related spawning grounds and habitat for those hydropower projects licensed by the Federal Energy Regulatory Commission (FERC). Section 18 of the FPA provides authority for NOAA Fisheries to issue mandatory fishway prescriptions when we determine it necessary to "maintain all life stages of such fish." The fishway prescription requires the

licensee to construct and maintain a fishway, which can include project operations necessary for the fishway to function.

Additionally, FERC must ensure that the proposed hydropower project preserves other aspects of environmental quality, and be best adapted to a comprehensive plan for developing the waterway; for providing adequate protection, mitigation, and enhancement of fish and wildlife, and for other public uses. FERC hydropower projects are licensed for 30-50 years, and it is during the relicensing process (or during the original licensing process, in the case of a new project) that NOAA Fisheries exercises our authority, although there are provisions to re-open a license. The FPA presents NOAA Fisheries with a superb tool for restoring access to habitat and for benefitting our trust resources. The science and engineering of fishways and hydropower operations has improved immensely since the time that many of these hydro projects were licensed.

The **Fish and Wildlife Coordination Act** (16 U.S.C. 661-666c; Act of March 10, 1934, as amended) requires that wildlife, including fish, receive equal consideration and be coordinated with other aspects of water resource development. This is accomplished by requiring consultation with NOAA Fisheries, and the U.S. Fish and Wildlife Service, whenever any body of water is proposed to be modified in any way and a Federal permit or license is required. This consultation determines the possible harm to fish and wildlife resources, and the measures that are needed to both prevent the damage to and loss of these resources, and to develop and improve the resources, in connection with water resource development. NOAA Fisheries submits comments and recommendations to Federal licensing and permitting agencies and to Federal agencies conducting construction projects on the potential harm to living marine resources caused by the proposed water development project, and submits recommendations to prevent harm.

Summary of NOAA Fisheries CALFED Involvement

NOAA Fisheries has been an active participant in the CALFED Bay-Delta Program since it began in May of 1995 to address the complex issues that surround the San Francisco Bay/Sacramento-San Joaquin Delta estuary and watershed. We were actively involved in the planning phase and helped develop the CALFED Programmatic Record of Decision (ROD), signed on August 28, 2000. Since then, we have continued our involvement through the implementation phase.

Within our existing authorities, NOAA Fisheries' role has been to provide overall program oversight and coordination in cooperation

with all CALFED agencies, State and Federal. More specifically, we have been actively engaged, through our Southwest Region, in the development and implementation of the Ecosystem Restoration Program, and the Environmental Water Account. Our Southwest Regional Office and Southwest Science Center have also provided support to the CALFED Science Program. NOAA Fisheries has sat on the CALFED Policy Group, the CALFED State-Federal Management Group and a variety of subcommittees addressing such issues as ecosystem restoration, water supply and water operations, and science.

Adequacy of current authorities and discretion

NOAA Fisheries believes that existing authorities are adequate to provide for our continued involvement in the CALFED Bay-Delta Program and to implement the program within the scope of the August 2000 CALFED ROD. However, in order to fully participate as a member of the newly formed California Bay-Delta Authority, programmatic authorization may be necessary. While we believe that our current authorities are adequate to implement NOAA Fisheries' portion of the CALFED program, any changes to the scope of the CALFED program would require examination to determine the adequacy of existing authorities in implementing the proposed changes.

Mr. Chairman, that concludes my prepared testimony. Again, thank you for this opportunity to appear before you today. I would be pleased to answer any questions you or members of the Committee may have.